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In the Supreme Court of the United States

OCTOBER TERM, 1993

ALLAN S. HALEY AND ROBERTA J. ROWLANDS,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE
AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a motion for leave to file out of time a motion to vacate or revise a Tax Court decision, filed more than 30 days but within 90 days after entry of the decision, and thereafter denied by the Tax Court, tolls the running of time for appeal of the Tax Court decision.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A1-A5, A6-A8) are unpublished, but the decisions are noted at 5 F.3d 536 (Table). The opinions of the Tax Court (Pet. App. A9-A17, A18-A20) are unreported. The opinion of the district court (Pet. App. A21-A26) is reported at 805 F. Supp. 834.

JURISDICTION

The judgments of the court of appeals were entered on August 16, 1993. Petitions for rehearing were denied on October 14, 1993 (Pet. App. A27-A28). The petition for a writ of certiorari was filed on January 12, 1994. The ju-

risdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 29, 1983, the Internal Revenue Service issued a notice of deficiency to petitioners Allan S. Haley and Roberta J. Rowlands in connection with their joint income tax return for 1975. The notice described a deficiency of $20,584 in income taxes for 1975, as well as additions to tax for negligence under 26 U.S.C. 6653(a) (Pet. 5). Petitioners filed a timely petition for review of the deficiency in Tax Court.

On November 24, 1986, petitioners' counsel executed on their behalf a stipulation of settlement for tax shelter adjustments, in which the IRS conceded that petitioners would not be liable for additions to tax under 26 U.S.C. 6653(a) for any years prior to 1982 (No. 91-70739: CR 10; CR 19 at 2).* The stipulation was filed with the Tax Court on December 1, 1986. (*Ibid.*). On April 2, 1987, a request for admissions was served on petitioners' counsel, seeking admission that the transactions at issue in this case were the same as those considered by the Tax Court in the test case of *Pike* v. *Commissioner*, 78 T.C. 822 (1982), aff'd, 732 F.2d 164 (9th Cir. 1984). Petitioners' counsel received the request on April 28 or 29, 1987 (No. 91-70739: CR 27 Exh. A). Neither petitioners nor their counsel filed any response to that request.

2. a. On January 29, 1990, the IRS filed a motion for an order to show cause why decision should not be entered against petitioners on the basis of the court's decision in

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* "CR" references are to the docket control numbers assigned to documents in the original record on appeal by the clerk of the Tax Court in No. 91-70739 and by the clerk of the district court in No. 92-16391. Each CR reference is preceded by the Ninth Circuit docket number to which it pertains.

Pike v. *Commissioner*, *supra*. On July 19, 1990, after requesting and reviewing a response from petitioners, the Tax Court issued a decision holding that the matters contained in the request for admissions were deemed admitted as of May 4, 1987, because no timely response had been filed and no extension had been requested or granted by the court (No. 91-70739: CR 19 at 2). The Tax Court further held that, based on the deemed admissions, decision should be entered against petitioners for 1975 in the full amount of the asserted deficiency except that, due to the stipulation of settlement, no additions to tax under 26 U.S.C. 6653(a) would be imposed (No. 91-70739: CR 19 at 2-3).

On September 19, 1990, the Tax Court issued an order clarifying certain immaterial matters within the decision entered on July 19, 1990. In that clarifying order, the court explicitly stated that these revisions did not alter or affect the running of the time period under 26 U.S.C. 7481 for the finality of the original decision or the time to appeal from that decision under 26 U.S.C. 7483 (No. 91-70739: CR 20).

On October 15, 1990, petitioners filed a motion for leave to file out of time a motion to vacate or revise the decision of July 19, 1990 (No. 91-70739: CR 27). The Tax Court lodged but did not file the accompanying proposed motions (No. 91-70739: CR 37).

On December 12, 1990, the IRS assessed the deficiency that the Tax Court's decision sustained (No. 92-16391: CR 1 at 3-4 & Exh. 8). On May 6, 1991, the IRS issued a notice of intent to levy to collect the taxes due (No. 92-16391: CR 1 Exh. 11).

On September 26, 1991, the Tax Court issued an order denying all of petitioners' pending motions, including the motion for leave to file a motion to vacate or revise out of

time (No. 91-70739: CR 37). On November 27, 1991, petitioners filed a notice of appeal (No. 91-70739: CR 38).

b. The court of appeals affirmed in part and dismissed in part (Pet. App. A1-A5). The court rejected petitioners' argument that the time for filing an appeal was tolled simply by the filing of a motion for leave to file out of time a motion to vacate or revise the Tax Court's decision (*id.* at A3-A4). The court also rejected petitioners' contention that the Tax Court order of September 19, 1990, "modified" the order of July 19, 1990, and therefore started a new appeal period (*id.* at A3). The court found that the September 19 order merely clarified and did not have a substantive effect on the earlier order, and, by its explicit terms, did not affect the running of the appeal period. The court therefore dismissed petitioners' untimely appeal of the July 19, 1990, order (*id.* at A3-A4).

The court further concluded that the Tax Court had not abused its discretion in denying petitioners' motion for leave to file out of time. The court therefore affirmed the order of September 26, 1991 (Pet. App. A4-A5).

3. a. On November 22, 1991, petitioners filed a complaint in federal district court seeking injunctive and declaratory relief against enforcement of the assessment entered for their 1975 taxes. Petitioners claimed that the December 12, 1990, assessment was invalid because the decision of the Tax Court had not become final at that time. They asserted that (i) the order issued September 19, 1990, had extended the time for their appeal and (ii), in the alternative, the filing of a motion for leave to file out of time a motion to vacate or revise the Tax Court decision had, by its own force, tolled the running of the time for appeal (No. 92-16391: CR 1 at 5 & Exh. 9).

The district court granted the government's motion for summary judgment. The court held that the assess-

ment was not premature because the Tax Court's September 19, 1990, order, by its terms, did not affect the finality of the July 19 decision or the time for appeal from that decision (No. 92-16391: CR 20 at 4). The district court further held that an untimely motion for leave to file a motion to vacate or revise a Tax Court decision does not extend the time for appeal or the date on which the decision becomes final (No. 92-16391: CR 20 at 4-5).

b. The court of appeals affirmed (Pet. App. A6-A8). The court held that the decision of the Tax Court had become final when no notice of appeal was filed within 90 days following the July 19, 1990, order and that the assessment was therefore valid (*id.* at A7-A8). The court distinguished the decisions relied upon by petitioners, noting that each involved either timely motions to vacate or revise (motions filed within 30 days of the decision) or motions for leave to file out of time that were granted by the Tax Court (*id.* at A8).

ARGUMENT

The decisions of the court of appeals are correct and do not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Rule 13(a) of the Federal Rules of Appellate Procedure states that "[t]he running of the time for appeal is terminated as to all parties by a timely motion to vacate or revise a decision made pursuant to the Rules of Practice of the Tax Court." Tax Court Rule 162 specifies that motions to vacate or revise "shall be filed within 30 days after the decision has been entered, unless the Court shall otherwise permit."

Taxpayers rely (Pet. 12-13) on *Simon* v. *Commissioner*, 176 F.2d 230 (2d Cir. 1949), for the proposition that the filing of a motion for leave to file out of time a

motion to revise or vacate *by itself* tolls the appeal time and delays the finality of the Tax Court decision. In *Simon*, the taxpayer filed a motion for leave to file out of time a motion for review by the full court 90 days after decision against him was entered. On the following day, the Tax Court granted the motion for leave to file out of time but denied the motion for review by the full court. The Second Circuit held that the appeal period was extended by the filing of the motion for leave to file out of time because it was filed within 90 days of the decision and was granted by the Tax Court, although the accompanying motion was denied. 176 F.2d at 231-232.

The present case differs from *Simon* in its controlling facts. Unlike *Simon*, where the motion for leave to file out of time was granted "pursuant to the Rules of Practice of the Tax Court" (Fed. R. App. P. 13(a)), in this case, the motion for leave to file out of time was denied by the Tax Court. Tax Court Rule 162 clearly permits the Tax Court to consider a motion to vacate or revise filed after 30 days following the decision (and within 90 days of that decision) but does not require it to consider such a motion. If the Tax Court chooses to consider such a motion, as it did in *Simon*, the time for appeal is thereby extended. 176 F.2d at 232. If, however, the Tax Court declines to consider such a motion, as it did in the instant case, the appeal period is not affected. It is well settled that the mere filing of an untimely motion to vacate or revise a decision does not toll the time for taking an appeal. See *Browder* v. *Director, Dep't of Corrections*, 434 U.S. 257, 264 (1977); *Sanders* v. *Clemco Industries*, 862 F.2d 161, 170 (8th Cir. 1988); *Denholm & McKay Co.* v. *Commissioner*, 132 F.2d 243, 248 (1st Cir. 1942).

2. Petitioners claim (Pet. 13) that there is a conflict between the Second Circuit's decision in *Simon* and the First Circuit's decision in *Denholm & McKay*. The as-

serted conflict, however, pertains to an issue that is not presented in this case. *Simon* involved a motion, filed on the 90th day, for leave to file out of time a motion for review by the full Tax Court. *Denholm & McKay*, which arose under the rules of the Board of Tax Appeals (the Tax Court's predecessor), also involved a motion to vacate or for reconsideration that was filed more than 30 days, but within 90 days, after entry of the Board's decision. In *Simon*, the Tax Court on the 91st day granted the motion for leave to file but denied the motion for full court review. The Second Circuit held that the time for appeal was thereby extended. In *Denholm & McKay*, the Board of Tax Appeals, acting eight months after entry of decision, granted the motion to vacate the decision. The First Circuit held that, absent some action by the Board within 90 days from entry of decision indicating that it was considering the untimely motion, the Board lost the power to rule on the untimely motion under its own Rules, and the Tax Court decision became final at the end of the 90th day. 132 F.2d at 248.

In the present case, the Tax Court *denied* the motion for leave to file out of time a motion to revise or vacate the court's decision. The question of the Tax Court's power under its Rules to *grant* such a motion after the 90th day after entry of decision—the issue with which *Simon* and *Denholm & McKay* dealt—is therefore not presented in this case. Thus, even if *Simon* and *Denholm & McKay* are in conflict, that alleged conflict is not at issue on the facts of this case. Review of the claimed conflict between *Simon* and *Denholm & McKay* is therefore not appropriate in this case. See, *e.g.*, *Alabama State Fed'n of Labor* v. *McAdory*, 325 U.S. 450, 461 (1945) (declining to give advisory opinion); *Muskrat* v. *United States*, 219 U.S. 346, 362 (1911) (same).

3. Petitioners contend (Pet. 14) that the decisions of the court of appeals denied them the opportunity to seek review of grounds for reconsideration that were not discovered in a timely manner. As the court of appeals correctly noted, however, "taxpayers' own lack of attention and diligence explains most of their procedural misfortunes" (Pet. App. A5). None of the untimely evidence was unavailable to petitioners at any time during the lengthy proceedings below. Instead, "taxpayers injudiciously and inappropriately distanced themselves from *their own petition*" (*ibid.*). As the court of appeals concluded, after examining "the issues raised with great care" (*ibid.*):

> Rules are for a purpose. Failure to comply with rules has consequences. Under the circumstances, 13th-hour pleas for mercy and discretion from the Tax Court and the IRS are not well grounded.

4. Finally, petitioners contend that there is a separate issue of an "illegally premature assessment" (Pet. 15). The allegation that the assessment was "illegally premature" rests on the same arguments addressed above concerning the timeliness of their appeal. As we have described, there is no conflict among the courts of appeals concerning whether petitioners' appeal was untimely. The further issue that petitioners now propose to raise in this Court—concerning whether a "premature" assessment is "void" or only "suspended" until the Tax Court decision becomes final—was not considered or addressed below. It therefore does not warrant this Court's consideration at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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